



E-contracts in e-commerce and its jurisdictional aspects: A study of Indian position in the framework of international instruments

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Abstract

When the parties are at a distance to each other then e-contracts serve as a very efficient and useful method of entering into the contract formation. E-commerce is the wider ambit within which e-contracts are there. E-commerce generally refers to the whole area of commercial transactions through the internet. And it involves entirely the whole gamut of organizations, institutions and individuals that govern, support and use these commercial activities.

Determination of jurisdiction is a matter of great concern in cases of e-contracts. Because unlike paper-based contracts they are not being performed in a particular place and can be performed across the globe, and therefore cross-border disputes may arise. So in determining the rights of consumers it becomes very important to determine the jurisdictional principles with respect to e-contracts.

This paper seeks to understand the basics of E-Contracts in the context of E-Commerce and the approach in US, UK and India to determine its jurisdictional aspect.

Keywords: e-contract, e-commerce, cross-border dispute, choice of law, jurisdiction

Introduction

Electronic contracts have become a major part of our lives and most of the times we are engaging in electronic contracts sometimes even without doing so unconsciously. The major reason for the growth and expansion of electronic commerce and e-contracts is speed, convenience and efficiency. E-contracts are essentially having the fundamental essentials of computer programs. The essentials of traditional form of contracts pertain to E-contracts also similarly. However, the main point of distinction comes into play when we are referring to the medium of this contract, i.e. the internet. The law relating to electronic contracts are governed by the same principles governing traditional contracts and are regulated by Indian Contract Act 1872 in India. It provides the whole framework of the formation of contracts and also the rights and duties of the parties to the contract. Both Indian Contract Act, 1872 and Information Technology Act, 2000 need to be read in conjunction to understand and provide legal validity to e-contracts.

When the parties are at a distance to each other then e-contracts serve as a very efficient and useful method of entering into the contract formation. The Information Technology Act by providing the framework of Digital Signatures has also provided legal validity to such formation of electronic contracts and their Authentication. E-commerce is the wider ambit within which e-contracts are there. E-commerce generally refers to the whole area of commercial transactions through the internet. And it involves entirely the whole gamut of organizations, institutions and individuals that govern, support and use these commercial activities. Determination of jurisdiction is a matter of great concern in cases of e-contracts. Because unlike paper-based contracts they are not being performed in a particular place and can be performed across the globe, and therefore cross-border

disputes may arise. So in determining the rights of consumers it becomes very important to determine the jurisdictional principles with respect to e-contracts.

E-Contracts and Its Various Categories in E-Commerce

Broadly Online transactions fall in the three categories

Business to customer (B2C)

Transactions in which there is a business entity on one side and individual customer on the other. It refers to a sale of goods and services to a customer by a seller or retailer which is conducted through the internet. For example Amazon.com is an online retailer who provides facilities to the customer in the form of B2C contracts.

Business to business (B2B)

Transactions where two business entities are involved in a commercial transaction. For example Great Indian Bazar, Plast Emart.

Customer to customer (C2C)

Transactions where both the entities are customers and the business entity is providing a web-based service to conclude the transaction. For example, OLX.

For the purpose of discussion in this paper only the first model i.e. B2C is dealt with. Protection of Customers in an online environment in a B2C transaction.

In the context of B2C contracts, broadly e-contracts can be categorised as 3 types

- E-mail based contracts- where the parties are exchanging communication through E-mail and the contract formation

takes place through email. The contract that is entered into is non-instantaneous and negotiable. The Model law and the IT Act provide the rules applicable to the formation of contracts in this manner

- Website contracts- the consumer may be availing goods or services by entering into a website and filling a form or making an account in the website. For example in case of buying e-ticket in the IRCTC website or booking online movie tickets in 'Bookmyshow'
- Online Agreements- E-contracts can be non-negotiable and instantaneous when they are in the form of online agreements.
- Click-wrap Agreements-This is the most common form of e-contracts found online. There is a standard set of terms to which a person may agree by clicking on the tab of "I Agree" or choose to not proceed by clicking on "I Disagree/ Cancel" tab. There is no scope for negotiation in these contracts.

Web-wrap contracts are these type of contracts be in the internet platform. For example when purchasing a software online from a website. After going through the terms and conditions you click on the "I agree" tab.

Or if a software CD is purchased and the installation of the software takes place only upon agreeing to these terms and conditions. This is also a click wrap agreement but not in the internet platform. This may also be called as Shrink-wrap agreements. The consumer gets the Cd of the software packaged with the licensing terms and conditions on the cover of the package. Only if he agrees to such terms and conditions then he opens the packet or may agree to them while the installation is being done. In the context of software applications, a usual shrink-wrap agreement is a software license that dictates a seller's terms to a buyer, and includes a conspicuous notice of agreement, title retention in the seller, restrictions on transfer and modification, prohibition of reverse engineering, and limited copying provisions.

Such agreements have been extensively challenged US courts, primarily on the ground that such courts do not provide adequate notice to the internet user. Some of the important decisions in this regard are-

In *Forrest v Verizon Communications Inc* ^[1], a forum selection clause present in a click-wrap agreement was enforced. It was held that only a portion of the agreement could be viewed in a scroll box did not imply that the notice to the user was inadequate.

In *Costar Realty Info. Inc v Field2* ^[2] and *Segal v Amazon.com Inc* ^[3] it was held that a click wrap agreement would be binding even if the user had failed to read the contract before accepting it. In *Fteja v Facebook, Inc* ^[4], the terms of service in the form of a hyperlink below the sign up button was held to a amount to adequate notice to user.

- Browse-wrap contracts-Browse wrap agreements list out their contract/terms and conditions (usually in the form of a hyperlink at the bottom of the website) on the website being accessed or the product being downloaded. Unlike a clickwrap agreement, where the user must expressly accept the terms and conditions by clicking on "I agree" box, a browse wrap agreement does not require this type of express acceptance of the terms. Here, the mere use of the product, for instance, browsing through the website or downloading the product will amount to the user's assent to the contract.

The enforceability of these agreements is, however, dependent on whether the user had actual or constructive notice of the terms and conditions:

In *Specht v Netscape Communications Corp* ^[5], the Second Circuit Court of Appeals held that a browse wrap agreement which was contained in a hyperlink that could not be viewed unless the user scrolled down to the next screen, did not constitute adequate notice to the user, and the clicking of the download button did not amount to consent to the agreement.

In *Ticketmaster v Tickets.com* ^[6], it was held that knowledge of the defendant of the terms and conditions to the website which were contained at the bottom of the home page in small print would have to be proved.

In *Hubbert v Dell Corp* ^[7], The Illinois Court of Appeal held that a browse wrap agreement to which the consumers received repeated exposure in the form of the words "All sales are subject to the Dell's Terms and conditions of Sale" in a series of pages which had to be accessed to complete a purchase, and a conspicuous blue hyperlink to the terms and conditions was enforceable.

Jurisdiction issues in electronic contracts

In the UNCITRAL Model Law or the UN Convention on the use of electronic Communications in International Contracts there are no explicit provisions determining the jurisdiction in e-contract cases. But the jurisdictional principles may emerged and analysed from the provisions relating to the time and place of dispatch and receipt of the electronic records, or connecting factors such as the "principal place of business" which may help in determining the jurisdiction.

Private international law principles in electronic contracts and their harmonization through international instruments.

Private International Law is governed by two basic principles of proper law/Default law and freedom of choice. Proper law means that the law having the closest connection to the matter and freedom of choice means party autonomy whereby the parties may themselves choose the jurisdiction of a particular court to govern their disputes.

When it comes to consumer contracts, since they are the weaker parties in a contract, so rules are developed in a such a way that it gives "protection to the weaker party" by the Private international law rules. These kind of provisions in harmonisation with the private international conventions can be found in legal instruments such as Brussels Convention or the Rome Convention. So there are special rules as to the jurisdiction and choice of law when it comes to Consumer Contracts.

The basis of choice of applicable law with respect to the closest connecting factors may often prove detrimental to consumers because in most cases the system of law may be of the business home and may be prejudicial to the consumers.

The courts usually decide jurisdiction on the basis of factors like, the place of performance of the contract or the place of breach or the place of advertising.

The location of server may also play an important role in international e-contracts. The technical status of server in the role of the choice of law rules is difficult to determine because a business website may have several servers, or mirror servers, through which it carries its activities.

In India, The courts apply the internal law once the parties submit to its jurisdiction. Selection of courts of a particular country as having jurisdiction in matters arising under the contract is usually the indication of the intention of the that the system of law followed by these courts is the proper law by which they intend their contract to be governed^[8]. If dispute is raised and case goes to Indian court, the court will recognize choice of law clause subject to lawfulness of contract under Indian laws. That includes, but not limited, to make sure that the contract is not forced, there is no fraud; object of contract is lawful according to Indian law etc. Indian Contract Act, 1872, Section 10 defines what agreements are contracts^[9]. Section 11 of the act defines who are competent to contract, Section 13 of the act defines what consent is, and Section 14 of the act defines free consent that further pointing to section 15 to 22 defining what is not included in free consent, Section 23 defines what consideration and objects are lawful and further from section 24 to 30 of the act defines void contracts. There is no law existing in India that bars enforcement of foreign law so parties can choose what law will govern any dispute between them for that contract. The Indian court will enforce forum selection clause if the selected forum is in accordance with Indian law.

Position in EU

▪ **Brussels 1 regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters**

In EU the EC Directive on Electronic commerce do not help in establishing any provisions relating to Jurisdiction.

The Brussels I Regulation adopted on 8th May December 2000 which replaced the Brusels Convention, establishes certain rules regarding the determination of Jurisdiction. Article 23(2) of the Brussels 1 Regulation, recognises agreements by electronic means. It provides that “any communication by electronic means which provides a durable record of, the agreement shall be equivalent to writing”. It means that a contract stored in a computer as a secured word document (i.e. a read-only document or document with entry password), or concluded by email and click-wrap agreement falls within the scope of Article 23(2) of the Brussels I Regulation.

▪ **Clauses in contract having the choice of court**

Generally a contract which is well-drafted in all aspects will have jurisdiction clause whereby it would be fixed that in case of any dispute in would be subjected to the jurisdiction of which particular court or courts of which particular country. Article 23 of the Brussels Regulation gives choice to the parties to have a court of their choice to determine the dispute.

However, Article 23(3) includes an exemption to parties, none of whom is domiciled in a member state. In this situation, the chosen courts have discretion to determine the existence and exercise of their jurisdiction in accordance with their own law.

In e-contracts this kind of clause can be inserted in the standard terms of the contract whereby the website owner can incorporate a choice of jurisdiction clause into an interactive click-wrap agreement that the buyer needs to click the “I agree” button to assent to it.

Article 15 to Article 17 exclusively deal with Jurisdiction provisions with respect to Consumer contracts.

Articles 15-17 of the Regulation confer additional jurisdiction over a contractual dispute between a consumer and a business on the courts of the consumer's country of domicile when certain tests are met. These articles replace articles 13-15 of the Convention and make certain changes. Under Article 15 if its a contract which fulfils the conditions given

- a. *it is a contract for the sale of goods on instalment credit terms; or*
- b. *it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or*
- c. *in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.”*

Then the consumer can use the jurisdictional provisions under A. 16 and A. 17.

Article 15 (1) (c) becomes very important in order to determine the jurisdiction in consumer protection cases in e-contracts. It has been modified from A. 13 of the Brussels Convention, and provides scope for the e-contracts performed through websites with the consumers. As per Brussels convention, the contract had to be concluded in his country of domicile. Now this is not applicable any more and the new connecting factor now is directing the activities to the country of consumer’s domicile^[10]. This has been done to remove the difficulties posed in cases of e-contracts through websites.

However this new criteria of “directing the activities is just a new concept and it becomes a problematic area because there is no legal definition clarifying it. Article 16 provides that

“Article 16

1. *A consumer may bring proceedings against the other party to a contract either in the courts of the Member State in which that party is domiciled or in the courts for the place where the consumer is domiciled.”*

The rationale for special consumer rules is that the consumer is usually the weaker party, especially if he or she has paid in advance. The consumer rules do not prevent a consumer from suing under Article 2 or 5 should he or she prefers.

Article 17 of the Brussels Regulation provides the law regarding the choice of jurisdiction in cases of consumer e-contracts.

Article 17

“The provisions of this Section may be departed from only by an agreement:

1. *which is entered into after the dispute has arisen; or*
2. *which allows the consumer to bring proceedings in courts other than those indicated in this Section; or*
3. *which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Member State, and which confers jurisdiction on the courts of that Member State, provided that such an agreement is not contrary to the law of that Member State.”*

Thus, the principle of the freedom of choice is limited in the Brussels Regulation. Particularly, the Brussels Regulation does

not permit to deprive a consumer of the protection by choosing the jurisdiction outside the country of his domicile. In any case if the consumer contract satisfies the requirements of the Article 15 (1) (c) the consumer is entitled to refer to the court of his domicile.

▪ **Rome 1 regulation on the law applicable to contractual obligations**

Rome 1 Regulation adopted by the European Parliament and the Council of the European Union on 17 th June 2008. It was modified from its predecessor, Rome Convention to harmonize the principles of Private International Law.

Article 6 of the Rome Convention, gives the choice of law rules and it basically gives-

1. Equal application of application to EU-resident as well as non-EU resident consumers, unlike Brussels Regulation which applies only to consumers who are having domicile in EU
2. Party autonomy which is restricted by application of mandatory rules of a consumer place of residence, whichever law is chosen.

Article 6 provides-

“1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:

- a. pursues his commercial or professional activities in the country where the consumer has his habitual residence, or*
- b. by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities.”*

Article 6 gives basically 2 kinds of situation for protection of consumers

1. A consumer contract will be governed by the substantive law of the consumer’s habitual residence if choice of law has not been made by the parties.
2. if the parties have made a choice of law then that law will be applicable provided it does not deprive the consumer from the level of protection it gets in its domicile state.

With regard to the consumer contracts universal application of the Rome I Regulation is unlimited. Nothing in the Rome I Regulation prohibits choosing the law of the non-member country as the governing law. It differs greatly from the provisions of the Brussels Regulation which has, firstly, the general inter partes limitation (according to the Article 2 a defendant has to be domiciled in a Member State) and special inter partes limitation in relation to consumer contracts (protects only the consumers who are domiciled in EU Member States (Article 15)

Position in US

In the US basically there is a two-pronged test for determination of jurisdiction over a defendant who is a non-resident. Firstly it has to be seen that whether the “Long arm statute” would allow

the defendant to be brought within the jurisdiction of its courts by any statutory basis. The second test would be to determine whether the defendant had done some “purposeful availment” or having a business in that State, by which the defendant could be brought within the jurisdiction of that state.

In addition, specific jurisdiction can also be examined by two factors: exercise of jurisdiction is consistent with these requirements of “minimum contacts”^[11] and “fair play and substantial justice”. These “minimum contacts” may consist of physical presence, financial gain, stream of commerce, and election of the appropriate court via contract^[12].

In the case of *Zippo Mfg. Co. v. Zippo Dot Com, Inc*^[13] The minimum contact standard was clarified and expanded by the “sliding scale” approach. The “minimum contact” approach should also be adhering to the traditional notions of fairplay and justice.

The sliding scale approach established by this case is very important in analysing the liability of websites and online contracts. Over the internet the activity which the website is indulging in determine the jurisdictional aspects.

The sliding scale approach divides the nature of activity of the websites into three categories.

- Active websites are those that directly interact and involve in the business with the consumers.
- Passive websites do not conduct business directly, and they may just be providing information. By posting certain information only, the defendant would not be within the jurisdiction of the Foreign state.
- Interactive websites are those which are in between active and passive websites. In this case the jurisdiction has to be determined on the “level of interactivity and commercial nature of the exchange of information that occurs on their web site.”

In case of online contracts in e-commerce sites there is generally always a high level of interaction. So jurisdiction will be exercised in these cases. However if the activities are more inclined toward the passive side then the jurisdiction would not apply.

In the case of *Calder v Jones*^[14], the US courts have developed the concept of the “effect theory”. It permits states to exercise jurisdiction when the defendants intentionally harm forum residents. In applying this “effects” test to Internet cases, U.S courts focus on the actual effects the website has in the forum state rather than trying to examine the characteristics of the website or web presence to determine the level of contact the site has with the forum state.

The effect test is more important in cases of individual consumer dispute where in cases of online contracting through an e-commerce website if the consumer faces a detrimental effect in his state. However, an “effect” test will more easily apply to injuries in tort to individuals where injury is localized or intent can be inferred, but not when E-commerce cases involving corporations.

Basis of Jurisdiction under Indian Law

▪ **Information technology Act 2000**

The objectives of the Information Technology Act, as outlined in the preamble, are to provide legal recognition for E-commerce transactions, and facilitate Electronic Governance. The

provisions of this Act enables the act applicable also to those offences or contraventions committed outside India by any person irrespective of his nationality if the act or conduct constituting the offence or contravention involves a computer, computer system or computer network located in India^[15].

So if a person who is residing in America provides services to consumers in India online, and if he commits an offence under the IT Act then he would come under the jurisdiction of Indian courts.

▪ **The Indian penal code, 1908**

If a person commits an offence even beyond the territorial limits of India, but which by law may be tried in India then he will be tried according to the Indian Penal Code. It further defines the word "offence" includes every act committed outside India which, if committed in India, would be punishable under this Code^[16].

So if a person who resides in America provides services to consumers in India, and whereby he may be tried by law in India, then Indian Penal Code will be applicable.

▪ **The civil procedure code, 1908**

Section 20 of the Civil Procedure Code 1908 (CPC) deals with jurisdictional aspects, and states that a court may assume jurisdiction in a case, when the cause of action arises within its sphere. This section, although more relevant to domestic courts and is essentially the domestic law of a country, yet it can be interpreted so as to apply to transnational issues as well as private international law. This provision for jurisdiction based on the cause of action is quite wide in its ambit, enabling the court to assume jurisdiction over a dispute regardless of where the principles are resident or the situs of the business, so long as a portion of the cause of action takes place within the local jurisdiction, while still having an implied standard set, in a way similar to the US long-arm jurisdiction provisions.

"20. Other suits to be instituted where defendants reside or cause of action arises.-

Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction-

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises."

In India issues relating to jurisdiction in cyber space is not that common as in US. In the case of *Casio India Co. Ltd v Ashita Tele Systems Pvt Ltd*^[17], the Delhi High Court held that the mere access of a website from a place may be sufficient to impose jurisdiction of that court.

In *India TV Independent News Service Pvt Ltd V. India Broadcast Live LLC*^[18], it was held that mere access of the website would not be sufficient for imposition of jurisdiction, but it would be

seen that if the nature of the website is such that it is of an interactive nature and is directly indulging in business activities or providing some services to the consumers, then the court may have jurisdiction.

In the case of *Banyan Tree Holding (P) Limited v. A. Murali Krishna Reddy*^[19], the Delhi High Court overruled the Casio judgement and held that in the absence of a long-arm statute, in order to satisfy the forum court that it has jurisdiction to entertain the suit, the plaintiff would have to show that the defendant 'purposefully availed' itself of the jurisdiction of the forum court. For this it would have to be prima facie shown that the nature of the activity indulged in by the defendant by the use of the website was with an intention to conclude a commercial transaction with the website user and that the specific targeting of the forum state by the defendant resulted in an injury or harm to the plaintiff within the forum state.

Undoubtedly the decision of *Banyan Tree Holding (P) Limited v. A. Murali Krishna Reddy* and Anr has added a new chapter on the protection of trade mark in India. In 21st century the use of Internet is not limited to e-mailing, surfing, browsing, etc. It is increasingly used by commercial organizations to promote themselves and their products and services. It is also interactively used to buy and sell products. The amplification of the ambit of the principle of 'cause of action' in decision of the *Banyan Tree Holding Pvt Ltd* would indisputably tighten the screw on the infringement of trade mark and passing off goods or services through the active use of internet in spite of not having a physical presence before the judicial forums^[20].

Conclusion

In today's age of electronic commerce India is also growing at a fast pace in this area. E-contracts are different from traditional contracts in various aspects and so the laws relating to it have to be also different from traditional contract law in various aspects. Implied terms may be forming a part of the contract by way of any principles of Business efficacy or some established custom or usage. These are some standard set of rules which would be incorporated by implication, unless something contrary is explicitly provided in the contract. Terms may be implied by the common law such as the implied term of seaworthiness implied into contracts for the carriage of goods by sea^[21], and the implied rule of non-derogation from grant^[22]

Generally, any e-contract should have the general clauses like any other paper based contract, such as Rights duties and Obligations, Warranties and Indemnities, Remedy, Confidentiality, Jurisdiction clause and governing law, Arbitration clause etc.

In a normal contract scenario the parties get access to wider amount of knowledge and can take a fully informed decision in a much easier way. However in e-contracts the law needs to ensure that the parties and consumer is not at a lesser advantageous position than in a normal contract. In ensuring consumer protection in e-contracts, the components of its validity, the time of actual completion of acceptance, the jurisdictional principles in case of consumer disputes are some of the important points on which the law requires uniformity and clarity. Also the right of the consumer to cancel the contract needs to be analysed and implemented in legal principles.

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